

## 2003 DRAFTING REQUEST

### Bill

Received: **09/24/2003**

Received By: **rkite**

Wanted: **As time permits**

Identical to LRB:

For: **Spencer Black (608) 266-7521**

By/Representing: **Bill Graf**

This file may be shown to any legislator: **NO**

Drafter: **rkite**

May Contact:

Addl. Drafters:

Subject: **Trade Regulation - electron com**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Black@legis.state.wi.us**

Carbon copy (CC:) to:

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### Pre Topic:

No specific pre topic given

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### Topic:

Regulating unsolicited electronic mail

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### Instructions:

See Attached

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### Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
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/P1	rkite 10/28/2003	kfollett 10/29/2003	chaugen 10/29/2003	_____	lemery 10/29/2003		S&L
/1	rkite 11/12/2003	kfollett 11/13/2003	jfrantze 11/13/2003	_____	sbasford 11/13/2003	lemery 11/13/2003	

FE Sent For:

**<END>**

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1/?	rkite	1 P1 KJ 10/29	Ch 10-29	Ch 10-29 P6			

FE Sent For:

&lt;END&gt;

## Kuesel, Jeffery

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**From:** Graf, Bill  
**Sent:** Wednesday, September 24, 2003 9:12 AM  
**To:** Kuesel, Jeffery  
**Subject:** drafting request

Jeff, attached is the California anti-spam law. Spence would like a bill drafted exactly like the California law. Below is a news stories about Gov. Davis signing the law.

Bill Graf  
Assistant to Representative Spencer Black

214 North, State Capitol  
P.O. Box 8952  
Madison, WI 53708  
(608) 266-7521



California Spam  
Bill.htm

September 24, 2003

## California Is Set to Ban Spam

By SAUL HANSELL

California is trying a deceptively simple approach to the problem of junk e-mail: it is banning spam.

Gov. Gray Davis signed into law last night a bill that outlaws sending most commercial e-mail messages to anyone in the state who has not explicitly requested them. That makes it the most wide-reaching law of any of the 35 other state laws meant to regulate spam - or any of the proposed bills in Congress.

"We are saying that unsolicited e-mail cannot be sent and there are no loopholes," said Kevin Murray, the Democratic state senator from Los Angeles who sponsored the bill.

The law, which also prohibits companies inside the state from sending unsolicited e-mail to anyone outside the state, imposes fines of \$1,000 for each message, up to \$1 million for each campaign.

Moreover, the proponents of the measure say, it promises to carry greater weight than most such laws because it gives people the right to file private lawsuits, encouraging action by plaintiffs' lawyers even if state prosecutors have other priorities. A similar provision is credited with helping to ensure compliance with the federal law against unsolicited faxes.

Marketers vehemently argue that California's approach is misguided, saying it will do little to restrain the shadowy spammers responsible for most of the objectionable messages often relayed through foreign computers.

"The people sending the latest penis enlargement schemes are not going to pay attention to this," said H. Robert Wientzen, president of the Direct Marketing Association. "This is a group of politicians trying to cash in on a popular issue and will create more confusion and problems than solutions."

The law is similar to one recently enacted in Britain that bans the sending of marketing e-mail to people who do not request it. Most other state laws, and the proposed federal law, allow unsolicited e-mail until the recipient

asks to receive no more.

The California law says users must explicitly agree to receive e-mail from each advertiser. That would appear to ban the preferred marketing strategy of many big advertisers: renting lists of people who have agreed to receive e-mail offers, often as part of a sweepstakes entry. "We don't differentiate between Disney and Viagra," Senator Murray said. "If you go out and rent a list of e-mail addresses, by definition you are not a legitimate business. You are the person we are trying to stop."

The law is scheduled to take effect on Jan. 1. But it faces several hurdles. Many of the bills pending in Congress would pre-empt tougher state laws. And it is bound to be challenged on constitutional grounds.

David E. Sorkin, a professor at the John Marshall Law School in Chicago, said that the law would probably survive a claim that it violated the First Amendment, as courts have held that commercial speech deserves lesser protection than private speech. But it could be struck down as an unconstitutional interference with interstate commerce.

"I don't think that states have much business regulating the Internet," he said. "If you can't tell where the recipient of an e-mail is, and still have to comply with different state regulations, it is a burden on interstate commerce."

But if the law survives challenge, it could well have a significant effect on spam. Coming from the nation's most populous state and the home to many large Internet companies, the new law puts a burden on the sender to determine if the recipient resides in California, a technically hard task.

"California represents up to 20 percent of the e-mail that is sent or received," said J. Trevor Hughes, the executive director of the Network Advertising Initiative, a group of technology companies that send e-mail for marketers. "Instead of trying to segregate the California e-mail addresses, many of our members are going to make the California standard the lowest common denominator."

Until now, state laws against spam have largely tried to ban deceptive practices in commercial e-mail, like fake return addresses. Many require that spam be identified with the phrase "ADV" in the subject line. Only Delaware has also banned sending unsolicited e-mail. But that law can be enforced only by the state attorney general, who has not taken any action under the statute.

Action under the California law, by contrast, can be brought by the state, by e-mail providers that have to handle spam, and by the recipients themselves. At a news conference yesterday in Sacramento, Kathleen Hamilton, the director of the state's Department of Consumer Affairs, promised to enforce the law when it goes into effect on Jan. 1.

The law's proponents argue that the right of individuals to sue represents the most important form of enforcement.

"A few well-placed pieces of litigation can do wonders," said Debra Bowen, a California state senator from Redondo Beach, who had proposed legislation similar to the new law.

But e-mail companies are already preparing for an onslaught of lawsuits they say will be frivolous.

"Small claims court will be filled with people suing legitimate marketers saying they don't remember signing up for this list," said Kenneth Hirschman, general counsel for Digital Impact, a big e-mail marketing company in San Mateo, Calif. "The companies will have to trudge down to the court and say here is the evidence that this person has opted in."

The law allows companies to send commercial e-mail messages to their customers, to those who have inquired about products or services, and those that have "expressly consented to receive e-mail advertisements from the



advertiser."

In what appears to be a concession to [Microsoft </redirect/marketwatch/redirect.ctx?MW=http://custom.marketwatch.com/custom/nyt-com/html-companyprofile.asp&symb=MSFT>](#), the bill exempts some e-mail advertising sent by the provider of a free e-mail service to its users. Microsoft runs Hotmail, the largest free e-mail service, in part from computers in California. Microsoft, which had opposed similar legislation proposed in California earlier this year, says it now supports the current law.

Senator Murray argued that the new law would have more impact than earlier efforts because it applies to a company whose product is advertised, not just the company that actually sends the e-mail.

"When you go after the advertiser, you don't have the same offshore problems than when you go after the sender," he said. "People selling products have to have a local presence. They have to ship them from somewhere and they need a bank account to get paid."

If such suits prove to be effective, it could well have a significant chilling effect, said Keith Cohn, chief executive of the Vendare Group, a big e-mail marketing company in Sherman Oaks, Calif.

"If someone could make a claim on me because of what an affiliate did, it may well eliminate all the legitimate stuff because people will be running for the hills."

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## **Spam Laws: United States: State Laws: California**

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- Summary
  - California statutes
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### **CALIFORNIA BUSINESS AND PROFESSIONS CODE**

#### **DIVISION 7, PART 3, CHAPTER 1**

#### **ARTICLE 1.8. Restrictions On Unsolicited Commercial E-mail Advertisers**

**(added by S.B. 186 (2003), approved September 23, 2003)**

**§ 17529.** The Legislature hereby finds and declares all of the following:

(a) Roughly 40 percent of all e-mail traffic in the United States is comprised of unsolicited commercial e-mail advertisements (hereafter spam) and industry experts predict that by the end of 2003 half of all e-mail traffic will be comprised of spam.

(b) The increase in spam is not only an annoyance but is also an increasing drain on corporate budgets and possibly a threat to the continued usefulness of the most successful tool of the computer age.

(c) Complaints from irate business and home-computer users regarding spam have skyrocketed, and polls have reported that 74 percent of respondents favor making mass spamming illegal and only 12 percent are opposed, and that 80 percent of respondents consider spam very annoying.

(d) According to Ferris Research Inc., a San Francisco consulting group, spam will cost United States organizations more than ten billion dollars (\$10,000,000,000) this year, including lost productivity and the additional equipment, software, and manpower needed to combat the problem. California is 12 percent of the United States population with an emphasis on technology business, and it is therefore estimated that spam costs California organizations well over 1.2 billion dollars (\$1,200,000,000).

(e) Like junk faxes, spam imposes a cost on users, using up valuable storage space in e-mail inboxes, as well as costly computer band width, and on networks and the computer servers that power them, and discourages people from using e-mail.

(f) Spam filters have not proven effective.

(g) Like traditional paper "junk" mail, spam can be annoying and waste time, but it also causes many additional problems because it is easy and inexpensive to create, but difficult and costly to eliminate.

(h) The "cost shifting" from deceptive spammers to Internet business and e-mail users has been likened to sending junk mail with postage due or making telemarketing calls to someone's pay-per-minute cellular phone.

(i) Many spammers have become so adept at masking their tracks that they are rarely found, and are so technologically sophisticated that they can adjust their systems to counter special filters and other barriers against spam and can even electronically commandeer unprotected computers, turning them into spam-launching weapons of mass production.

(j) There is a need to regulate the advertisers who use spam, as well as the actual spammers, because the actual spammers can be difficult to track down due to some return addresses that show up on the display as "unknown" and many others being obvious fakes and they are often located offshore.

(k) The true beneficiaries of spam are the advertisers who benefit from the marketing derived from the advertisements.

(l) In addition, spam is responsible for virus proliferation that can cause tremendous damage both to individual computers and to business systems.

(m) Because of the above problems, it is necessary that spam be prohibited and that commercial advertising e-mails be regulated as set forth in this article.

§ 17529.1. For the purpose of this article, the following definitions apply:

(a) "Advertiser" means a person or entity that advertises through the use of commercial e-mail advertisements.

(b) "California electronic mail address" or "California e-mail address" means any of the following:

(1) An e-mail address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that e-mail address to a mailing address in this state.

(2) An e-mail address ordinarily accessed from a computer located in this state.

(3) An e-mail address furnished to a resident of this state.

(c) "Commercial e-mail advertisement" means any electronic mail message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

(d) "Direct consent" means that the recipient has expressly consented to receive e-mail advertisements from the advertiser, either in response to a clear and conspicuous request for the consent or at the recipient's own initiative.

(e) "Domain name" means any alphanumeric designation that is registered with or assigned by any domain name registrar as part of an electronic address on the Internet.

(f) "Electronic mail" or "e-mail" means an electronic message that is sent to an e-mail address and transmitted between two or more telecommunications devices, computers, or

*put elsewhere*

*don't need*

electronic devices capable of receiving electronic messages, whether or not the message is converted to hard copy format after receipt or is viewed upon transmission or stored for later retrieval. "Electronic mail" or "e-mail" includes electronic messages that are transmitted through a local, regional, or global computer network.

(g) "Electronic mail address" or "e-mail address" means a destination, commonly expressed as a string of characters, to which electronic mail can be sent or delivered. An "electronic mail address" or "e-mail address" consists of a user name or mailbox and a reference to an Internet domain.

(h) "Electronic mail service provider" means any person, including an Internet service provider, that is an intermediary in sending or receiving electronic mail or that provides to end users of the electronic mail service the ability to send or receive electronic mail.

(i) "Initiate" means to transmit or cause to be transmitted a commercial e-mail advertisement or assist in the transmission of a commercial e-mail advertisement by providing electronic mail addresses where the advertisement may be sent, but does not include the routine transmission of the advertisement through the network or system of a telecommunications utility or an electronic mail service provider through its network or system.

put in text

(j) "Incident" means a single transmission or delivery to a single recipient or to multiple recipients of unsolicited commercial e-mail advertisement containing substantially similar content.

(k) "Internet" has the meaning set forth in paragraph (6) of subdivision (e) of Section 17538.

don't need

(l) "Preexisting or current business relationship," as used in connection with the sending of a commercial e-mail advertisement, means that the recipient has made an inquiry and has provided his or her e-mail address, or has made an application, purchase, or transaction, with or without consideration, regarding products or services offered by the advertiser.

Commercial e-mail advertisements sent pursuant to the exemption provided for a preexisting or current business relationship shall provide the recipient of the commercial e-mail advertisement with the ability to "opt-out" from receiving further commercial e-mail advertisements by calling a toll-free telephone number or by sending an "unsubscribe" e-mail to the advertiser offering the products or services in the commercial e-mail advertisement. This opt-out provision does not apply to recipients who are receiving free e-mail service with regard to commercial e-mail advertisements sent by the provider of the e-mail service.

put in text

(m) "Recipient" means the addressee of an unsolicited commercial e-mail advertisement. If an addressee of an unsolicited commercial e-mail advertisement has one or more e-mail addresses to which an unsolicited commercial e-mail advertisement is sent, the addressee shall be deemed to be a separate recipient for each e-mail address to which the e-mail advertisement is sent.

put in text

(n) "Routine transmission" means the transmission, routing, relaying, handling, or storing of an electronic mail message through an automatic technical process. "Routine

transmission" shall not include the sending, or the knowing participation in the sending, of unsolicited commercial e-mail advertisements.

(o) "Unsolicited commercial e-mail advertisement" means a commercial e-mail advertisement sent to a recipient who meets both of the following criteria:

(1) The recipient has not provided direct consent to receive advertisements from the advertiser. *fix*

(2) The recipient does not have a preexisting or current business relationship, as defined in subdivision (l), with the advertiser promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

*how could you advertise w/o transmitting?*  
§ 17529.2. Notwithstanding any other provision of law, a person or entity may not do any of the following:

(a) Initiate or advertise in an unsolicited commercial e-mail advertisement from California or advertise in an unsolicited commercial e-mail advertisement sent from California. *advertise in an advertisement?*

(b) Initiate or advertise in an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.

(c) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect any other provision or application that can be given effect without the invalid provision or application. *don't need*

§ 17529.3. Nothing in this article shall be construed to limit or restrict the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, receive, route, relay, handle, or store certain types of electronic mail messages. *?*

§ 17529.4. (a) It is unlawful for any person or entity to collect electronic mail addresses posted on the Internet if the purpose of the collection is for the electronic mail addresses to be used to do either of the following:

(1) Initiate or advertise in an unsolicited commercial e-mail advertisement from California, or advertise in an unsolicited commercial e-mail advertisement sent from California.

(2) Initiate or advertise in an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to California electronic mail address.

(b) It is unlawful for any person or entity to use an electronic mail address obtained by

using automated means based on a combination of names, letters, or numbers to do either of the following:

(1) Initiate or advertise in an unsolicited commercial e-mail advertisement from California, or advertise in an unsolicited commercial e-mail advertisement sent from California.

(2) Initiate or advertise in an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.

(c) It is unlawful for any person to use scripts or other automated means to register for multiple electronic mail accounts from which to do, or to enable another person to do, either of the following:

(1) Initiate or advertise in an unsolicited commercial e-mail advertisement from California, or advertise in an unsolicited commercial e-mail advertisement sent from California.

(2) Initiate or advertise in an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address.

**§ 17529.5.** It is unlawful for any person or entity to advertise using a commercial e-mail advertisement either sent from California or sent to a California electronic mail address under any of the following circumstances:

(a) The commercial e-mail advertisement contains or is accompanied by a third party's domain name without the permission of the third party.

(b) The commercial e-mail advertisement contains or is accompanied by falsified, misrepresented, obscured, or forged header information. This paragraph does not apply to truthful information used by a third party who has been lawfully authorized by the advertiser to use that information. > ?  
0

(c) The commercial e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message.

**§ 17529.8.** (a) (1) In addition to any other remedies provided by this article or by any other provisions of law, a recipient of an unsolicited commercial e-mail advertisement transmitted in violation of this article, an electronic mail service provider, or the Attorney General may bring an action against an entity that violates any provision of this article to recover either or both of the following:

(A) Actual damages.

(B) Liquidated damages of one thousand dollars (\$1,000) for

each unsolicited commercial e-mail advertisement transmitted in violation of Section 17529.2, up to one million dollars (\$1,000,000) per incident.

(2) The recipient, an electronic mail service provider, or the Attorney General, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.

(3) However, there shall not be a cause of action against an electronic mail service provider that is only involved in the routine transmission of the unsolicited commercial e-mail advertisement over its computer network.

*isn't this already in draft?*

(b) If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of this article, the court shall reduce the liquidated damages recoverable under subdivision (a) to a maximum of one hundred dollars (\$100) for each unsolicited commercial e-mail advertisement, or a maximum of one hundred thousand dollars (\$100,000) per incident.

§ 17529.9. The provisions of this article are severable. If any provision of this article or its application is held invalid, that invalidity shall not affect any other provision or application that can be given effect without the invalid provision or application.

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**CALIFORNIA BUSINESS AND PROFESSIONS CODE  
SECTION 17538.45**

(as amended by S.B. 186 (2003), approved September 23, 2003)

§ 17538.45. (a) For purposes of this section, the following words have the following meanings:

(1) "Electronic mail advertisement" means any electronic mail message, the principal purpose of which is to promote, directly or indirectly, the sale or other distribution of goods or services to the recipient.

(2) "Unsolicited electronic mail advertisement" means any electronic mail advertisement that meets both of the following requirements:

(A) It is addressed to a recipient with whom the initiator does not have an existing business or personal relationship.

(B) It is not sent at the request of or with the express consent of the recipient.

(3) "Electronic mail service provider" means any business or organization qualified to do business in California that provides registered users the ability to send or receive electronic mail through equipment located in this state and

that is an intermediary in sending or receiving electronic mail.

(4) "Initiation" of an unsolicited electronic mail advertisement refers to the action by the initial sender of the electronic mail advertisement. It does not refer to the actions of any intervening electronic mail service provider that may handle or retransmit the electronic message.

(5) "Registered user" means any individual, corporation, or other entity that maintains an electronic mail address with an electronic mail service provider.

(b) No registered user of an electronic mail service provider shall use or cause to be used that electronic mail service provider's equipment located in this state in violation of that electronic mail service provider's policy prohibiting or restricting the use of its service or equipment for the initiation of unsolicited electronic mail advertisements.

(c) No individual, corporation, or other entity shall use or cause to be used, by initiating an unsolicited electronic mail advertisement, an electronic mail service provider's equipment located in this state in violation of that electronic mail service provider's policy prohibiting or restricting the use of its equipment to deliver unsolicited electronic mail advertisements to its registered users.

(d) An electronic mail service provider shall not be required to create a policy prohibiting or restricting the use of its equipment for the initiation or delivery of unsolicited electronic mail advertisements.

(e) Nothing in this section shall be construed to limit or restrict the rights of an electronic mail service provider under Section 230(c)(1) of Title 47 of the United States Code, or any decision of an electronic mail service provider to permit or to restrict access to or use of its system, or any exercise of its editorial function.

(f) (1) In addition to any other action available under law, any electronic mail service provider whose policy on unsolicited electronic mail advertisements is violated as provided in this section may bring a civil action to recover the actual monetary loss suffered by that provider by reason of that violation, or liquidated damages of fifty dollars (\$50) for each electronic mail message initiated or delivered in violation of this section, up to a maximum of twenty-five thousand dollars (\$25,000) per day, whichever amount is greater.

(2) In any action brought pursuant to paragraph (1), the court may award reasonable attorney's fees to a prevailing party.

(3) (A) In any action brought pursuant to paragraph (1), the electronic mail service provider shall ~~be required to~~ establish as an element of its cause of action that prior to the alleged violation, the defendant had actual notice of both of the following:

(i) The electronic mail service provider's policy on unsolicited electronic mail advertising.

(ii) The fact that the defendant's unsolicited electronic mail advertisements would use or cause to be used the electronic mail



service provider's equipment located in this state.

(B) In this regard, the Legislature finds that with rapid advances in Internet technology, and electronic mail technology in particular, Internet service providers are already experimenting with embedding policy statements directly into the software running on the computers used to provide electronic mail services in a manner that displays the policy statements every time an electronic mail delivery is requested. While the state of the technology does not support such a finding at present, the Legislature believes that, in a given case at some future date, a showing that notice was supplied via electronic means between the sending and receiving computers could be held to constitute actual notice to the sender for purposes of this paragraph.

(4) (A) An electronic mail service provider who has brought an action against a party for a violation subject to Section 17529.8 shall not bring an action against that party under this section for the same unsolicited commercial electronic mail advertisement.

(B) An electronic mail service provider who has brought an action against a party for a violation of this section shall not bring an action against that party under Section 17529.8 for the same unsolicited commercial electronic mail advertisement.

*look under  
worthless  
checks*

*add  
this to  
1st statute*

BILL NUMBER: SB 186 CHAPTERED 09/24/03

## CHAPTER 487

FILED WITH SECRETARY OF STATE SEPTEMBER 24, 2003

APPROVED BY GOVERNOR SEPTEMBER 23, 2003

PASSED THE SENATE SEPTEMBER 11, 2003

PASSED THE ASSEMBLY SEPTEMBER 8, 2003

AMENDED IN ASSEMBLY SEPTEMBER 5, 2003

AMENDED IN ASSEMBLY AUGUST 25, 2003

AMENDED IN ASSEMBLY AUGUST 18, 2003

AMENDED IN ASSEMBLY JULY 10, 2003

AMENDED IN ASSEMBLY JULY 9, 2003

AMENDED IN ASSEMBLY JUNE 26, 2003

AMENDED IN SENATE MAY 22, 2003

AMENDED IN SENATE MAY 6, 2003

AMENDED IN SENATE MARCH 17, 2003

INTRODUCED BY Senator Murray

(Principal coauthor: Assembly Member Correa)

(Coauthors: Assembly Members Bermudez, Maldonado, and Simitian)

FEBRUARY 12, 2003

An act to amend Section 17538.45 of, to add Article 1.8 (commencing with Section 17529) to Chapter 1 of Part 3 of Division 7 of, and to repeal Section 17538.4 of, the Business and Professions Code, relating to privacy.

## LEGISLATIVE COUNSEL'S DIGEST

SB 186, Murray. Privacy: unsolicited **commercial e-mail** advertising.

Existing law prohibits a person or entity conducting business in the state from e-mailing or causing to be e-mailed documents consisting of unsolicited advertising material, as specified, unless that person or entity establishes a toll-free telephone number or valid sender operated return **e-mail** address that a recipient may contact to notify the sender not to **e-mail** any further unsolicited documents. Existing law requires that notification of the toll-free telephone number, and a valid address that a recipient may write to, be included on these unsolicited e-mailed documents, and prohibits the e-mailing of these unsolicited advertising documents to a person who has requested not to receive them. Existing law requires certain unsolicited **e-mail** advertisements to contain a heading of "ADV:" or "ADV:ADLT." A violation of the provisions governing advertising is a misdemeanor.

This bill would delete these provisions. The bill would instead prohibit a person or entity located in California from initiating or advertising in unsolicited **commercial e-mail** advertisements. The bill would prohibit a person or entity not located in California from initiating or advertising in unsolicited **commercial e-mail** advertisements sent to a California **e-mail** address. The bill would also prohibit a person or entity from collecting **e-mail** addresses or registering multiple **e-mail** addresses for the purpose of initiating or advertising in an unsolicited **commercial e-mail** advertisement from California or to a California **e-mail** address. The bill would prohibit a person or entity from using a **commercial e-mail** advertisement containing certain falsified, misrepresented, obscured, or misleading information.

This bill would authorize the recipient of a **commercial e-mail**

advertisement transmitted in violation of these prohibitions, the electronic **mail** service provider, or the Attorney General to bring an action to recover actual damages and would authorize these parties to recover liquidated damages of \$1,000 per transmitted message up to \$1,000,000 per incident, as defined, subject to reduction by a court for specified reasons. The bill would provide for an award of reasonable attorney's fees and costs to a prevailing plaintiff. The bill would provide that a cause of action in existence prior to its enactment would be governed by the law in effect at the time it arose. The bill would enact other related provisions.

Existing law prohibits the registered user of an **e-mail** service provider, or any individual, corporation, or other entity, from using or causing to be used the provider's equipment located in this state in violation of the provider's policies with regard to unsolicited **e-mail** advertisements. Existing law authorizes an **e-mail** service provider whose policy is violated to bring a civil action to recover specified damages.

This bill would prohibit an **e-mail** service provider from bringing an action under both this provision and other provisions being added by the bill for the same unsolicited **e-mail** advertisement.

This bill would provide that if any part of these provisions or their applications is deemed invalid, the invalidity would not affect other provisions.

Because a violation of the bill would be a crime, it would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Article 1.8 (commencing with Section 17529) is added to Chapter 1 of Part 3 of Division 7 of the Business and Professions Code, to read:

Article 1.8. Restrictions On Unsolicited **Commercial E-mail** Advertisers

17529. The Legislature hereby finds and declares all of the following:

(a) Roughly 40 percent of all **e-mail** traffic in the United States is comprised of unsolicited **commercial e-mail** advertisements (hereafter spam) and industry experts predict that by the end of 2003 half of all **e-mail** traffic will be comprised of spam.

(b) The increase in spam is not only an annoyance but is also an increasing drain on corporate budgets and possibly a threat to the continued usefulness of the most successful tool of the computer age.

(c) Complaints from irate business and home-computer users regarding spam have skyrocketed, and polls have reported that 74 percent of respondents favor making mass spamming illegal and only 12 percent are opposed, and that 80 percent of respondents consider spam very annoying.

(d) According to Ferris Research Inc., a San Francisco consulting group, spam will cost United States organizations more than ten billion dollars (\$10,000,000,000) this year, including lost productivity and the additional equipment, software, and manpower needed to combat the problem. California is 12 percent of the United

States population with an emphasis on technology business, and it is therefore estimated that spam costs California organizations well over 1.2 billion dollars (\$1,200,000,000).

(e) Like junk faxes, spam imposes a cost on users, using up valuable storage space in **e-mail** inboxes, as well as costly computer band width, and on networks and the computer servers that power them, and discourages people from using **e-mail**.

(f) Spam filters have not proven effective.

(g) Like traditional paper "junk" **mail**, spam can be annoying and waste time, but it also causes many additional problems because it is easy and inexpensive to create, but difficult and costly to eliminate.

(h) The "cost shifting" from deceptive spammers to Internet business and **e-mail** users has been likened to sending junk **mail** with postage due or making telemarketing calls to someone's pay-per-minute cellular phone.

(i) Many spammers have become so adept at masking their tracks that they are rarely found, and are so technologically sophisticated that they can adjust their systems to counter special filters and other barriers against spam and can even electronically commandeer unprotected computers, turning them into spam-launching weapons of mass production.

(j) There is a need to regulate the advertisers who use spam, as well as the actual spammers, because the actual spammers can be difficult to track down due to some return addresses that show up on the display as "unknown" and many others being obvious fakes and they are often located offshore.

(k) The true beneficiaries of spam are the advertisers who benefit from the marketing derived from the advertisements.

(l) In addition, spam is responsible for virus proliferation that can cause tremendous damage both to individual computers and to business systems.

(m) Because of the above problems, it is necessary that spam be prohibited and that **commercial** advertising **e-mails** be regulated as set forth in this article.

17529.1. For the purpose of this article, the following definitions apply:

(a) "Advertiser" means a person or entity that advertises through the use of **commercial e-mail** advertisements.

(b) "California electronic **mail** address" or "California **e-mail** address" means any of the following:

(1) An **e-mail** address furnished by an electronic **mail** service provider that sends bills for furnishing and maintaining that **e-mail** address to a mailing address in this state.

(2) An **e-mail** address ordinarily accessed from a computer located in this state.

(3) An **e-mail** address furnished to a resident of this state.

(c) "**Commercial e-mail** advertisement" means any electronic **mail** message initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

(d) "Direct consent" means that the recipient has expressly consented to receive **e-mail** advertisements from the advertiser, either in response to a clear and conspicuous request for the consent or at the recipient's own initiative.

(e) "Domain name" means any alphanumeric designation that is registered with or assigned by any domain name registrar as part of an electronic address on the Internet.

(f) "Electronic **mail**" or "**e-mail**" means an electronic message that is sent to an **e-mail** address and transmitted between two or more telecommunications devices, computers, or electronic devices capable of receiving electronic messages, whether or not the message is converted to hard copy format after receipt or is viewed upon

transmission or stored for later retrieval. "Electronic **mail**" or "**e-mail**" includes electronic messages that are transmitted through a local, regional, or global computer network.

(g) "Electronic **mail** address" or "**e-mail** address" means a destination, commonly expressed as a string of characters, to which electronic **mail** can be sent or delivered. An "electronic **mail** address" or "**e-mail** address" consists of a user name or mailbox and a reference to an Internet domain.

(h) "Electronic **mail** service provider" means any person, including an Internet service provider, that is an intermediary in sending or receiving electronic **mail** or that provides to end users of the electronic **mail** service the ability to send or receive electronic **mail**.

(i) "Initiate" means to transmit or cause to be transmitted a **commercial e-mail** advertisement or assist in the transmission of a **commercial e-mail** advertisement by providing electronic **mail** addresses where the advertisement may be sent, but does not include the routine transmission of the advertisement through the network or system of a telecommunications utility or an electronic **mail** service provider through its network or system.

(j) "Incident" means a single transmission or delivery to a single recipient or to multiple recipients of unsolicited **commercial e-mail** advertisement containing substantially similar content.

(k) "Internet" has the meaning set forth in paragraph (6) of subdivision (e) of Section 17538.

(l) "Preexisting or current business relationship," as used in connection with the sending of a **commercial e-mail** advertisement, means that the recipient has made an inquiry and has provided his or her **e-mail** address, or has made an application, purchase, or transaction, with or without consideration, regarding products or services offered by the advertiser.

**Commercial e-mail** advertisements sent pursuant to the exemption provided for a preexisting or current business relationship shall provide the recipient of the **commercial e-mail** advertisement with the ability to "opt-out" from receiving further **commercial e-mail** advertisements by calling a toll-free telephone number or by sending an "unsubscribe" **e-mail** to the advertiser offering the products or services in the **commercial e-mail** advertisement. This opt-out provision does not apply to recipients who are receiving free **e-mail** service with regard to **commercial e-mail** advertisements sent by the provider of the **e-mail** service.

(m) "Recipient" means the addressee of an unsolicited **commercial e-mail** advertisement. If an addressee of an unsolicited **commercial e-mail** advertisement has one or more **e-mail** addresses to which an unsolicited **commercial e-mail** advertisement is sent, the addressee shall be deemed to be a separate recipient for each **e-mail** address to which the **e-mail** advertisement is sent.

(n) "Routine transmission" means the transmission, routing, relaying, handling, or storing of an electronic **mail** message through an automatic technical process. "Routine transmission" shall not include the sending, or the knowing participation in the sending, of unsolicited **commercial e-mail** advertisements.

(o) "Unsolicited **commercial e-mail** advertisement" means a **commercial e-mail** advertisement sent to a recipient who meets both of the following criteria:

(1) The recipient has not provided direct consent to receive advertisements from the advertiser.

(2) The recipient does not have a preexisting or current business relationship, as defined in subdivision (l), with the advertiser promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit.

17529.2. Notwithstanding any other provision of law, a person or entity may not do any of the following:

(a) Initiate or advertise in an unsolicited **commercial e-mail** advertisement from California or advertise in an unsolicited **commercial e-mail** advertisement sent from California.

(b) Initiate or advertise in an unsolicited **commercial e-mail** advertisement to a California electronic **mail** address, or advertise in an unsolicited **commercial e-mail** advertisement sent to a California electronic **mail** address.

(c) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect any other provision or application that can be given effect without the invalid provision or application.

17529.3. Nothing in this article shall be construed to limit or restrict the adoption, implementation, or enforcement by a provider of Internet access service of a policy of declining to transmit, receive, route, relay, handle, or store certain types of electronic **mail** messages.

17529.4. (a) It is unlawful for any person or entity to collect electronic **mail** addresses posted on the Internet if the purpose of the collection is for the electronic **mail** addresses to be used to do either of the following:

(1) Initiate or advertise in an unsolicited **commercial e-mail** advertisement from California, or advertise in an unsolicited **commercial e-mail** advertisement sent from California.

(2) Initiate or advertise in an unsolicited **commercial e-mail** advertisement to a California electronic **mail** address, or advertise in an unsolicited **commercial e-mail** advertisement sent to California electronic **mail** address.

(b) It is unlawful for any person or entity to use an electronic **mail** address obtained by using automated means based on a combination of names, letters, or numbers to do either of the following:

(1) Initiate or advertise in an unsolicited **commercial e-mail** advertisement from California, or advertise in an unsolicited **commercial e-mail** advertisement sent from California.

(2) Initiate or advertise in an unsolicited **commercial e-mail** advertisement to a California electronic **mail** address, or advertise in an unsolicited **commercial e-mail** advertisement sent to a California electronic **mail** address.

(c) It is unlawful for any person to use scripts or other automated means to register for multiple electronic **mail** accounts from which to do, or to enable another person to do, either of the following:

(1) Initiate or advertise in an unsolicited **commercial e-mail** advertisement from California, or advertise in an unsolicited **commercial e-mail** advertisement sent from California.

(2) Initiate or advertise in an unsolicited **commercial e-mail** advertisement to a California electronic **mail** address, or advertise in an unsolicited **commercial e-mail** advertisement sent to a California electronic **mail** address.

17529.5. It is unlawful for any person or entity to advertise using a **commercial e-mail** advertisement either sent from California or sent to a California electronic **mail** address under any of the following circumstances:

(a) The **commercial e-mail** advertisement contains or is accompanied by a third party's domain name without the permission of the third party.

(b) The **commercial e-mail** advertisement contains or is accompanied by falsified, misrepresented, obscured, or forged header information. This paragraph does not apply to truthful information used by a third party who has been lawfully authorized by the advertiser to use that information.

(c) The **commercial e-mail** advertisement has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding

the contents or subject matter of the message.

17529.8. (a) (1) In addition to any other remedies provided by this article or by any other provisions of law, a recipient of an unsolicited **commercial e-mail** advertisement transmitted in violation of this article, an electronic **mail** service provider, or the Attorney General may bring an action against an entity that violates any provision of this article to recover either or both of the following:

(A) Actual damages.

(B) Liquidated damages of one thousand dollars (\$1,000) for each unsolicited **commercial e-mail** advertisement transmitted in violation of Section 17529.2, up to one million dollars (\$1,000,000) per incident.

(2) The recipient, an electronic **mail** service provider, or the Attorney General, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs.

(3) However, there shall not be a cause of action against an electronic **mail** service provider that is only involved in the routine transmission of the unsolicited **commercial e-mail** advertisement over its computer network.

(b) If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited **commercial e-mail** advertisements that are in violation of this article, the court shall reduce the liquidated damages recoverable under subdivision (a) to a maximum of one hundred dollars (\$100) for each unsolicited **commercial e-mail** advertisement, or a maximum of one hundred thousand dollars (\$100,000) per incident.

17529.9: The provisions of this article are severable. If any provision of this article or its application is held invalid, that invalidity shall not affect any other provision or application that can be given effect without the invalid provision or application.

SEC. 2. Section 17538.4 of the Business and Professions Code is repealed.

SEC. 3. Section 17538.45 of the Business and Professions Code is amended to read:

17538.45. (a) For purposes of this section, the following words have the following meanings:

(1) "Electronic **mail** advertisement" means any electronic **mail** message, the principal purpose of which is to promote, directly or indirectly, the sale or other distribution of goods or services to the recipient.

(2) "Unsolicited electronic **mail** advertisement" means any electronic **mail** advertisement that meets both of the following requirements:

(A) It is addressed to a recipient with whom the initiator does not have an existing business or personal relationship.

(B) It is not sent at the request of or with the express consent of the recipient.

(3) "Electronic **mail** service provider" means any business or organization qualified to do business in California that provides registered users the ability to send or receive electronic **mail** through equipment located in this state and that is an intermediary in sending or receiving electronic **mail**.

(4) "Initiation" of an unsolicited electronic **mail** advertisement refers to the action by the initial sender of the electronic **mail** advertisement. It does not refer to the actions of any intervening electronic **mail** service provider that may handle or retransmit the electronic message.

(5) "Registered user" means any individual, corporation, or other entity that maintains an electronic **mail** address with an electronic **mail** service provider.

(b) No registered user of an electronic **mail** service provider

shall use or cause to be used that electronic **mail** service provider's equipment located in this state in violation of that electronic **mail** service provider's policy prohibiting or restricting the use of its service or equipment for the initiation of unsolicited electronic **mail** advertisements.

(c) No individual, corporation, or other entity shall use or cause to be used, by initiating an unsolicited electronic **mail** advertisement, an electronic **mail** service provider's equipment located in this state in violation of that electronic **mail** service provider's policy prohibiting or restricting the use of its equipment to deliver unsolicited electronic **mail** advertisements to its registered users.

(d) An electronic **mail** service provider shall not be required to create a policy prohibiting or restricting the use of its equipment for the initiation or delivery of unsolicited electronic **mail** advertisements.

(e) Nothing in this section shall be construed to limit or restrict the rights of an electronic **mail** service provider under Section 230(c)(1) of Title 47 of the United States Code, or any decision of an electronic **mail** service provider to permit or to restrict access to or use of its system, or any exercise of its editorial function.

(f) (1) In addition to any other action available under law, any electronic **mail** service provider whose policy on unsolicited electronic **mail** advertisements is violated as provided in this section may bring a civil action to recover the actual monetary loss suffered by that provider by reason of that violation, or liquidated damages of fifty dollars (\$50) for each electronic **mail** message initiated or delivered in violation of this section, up to a maximum of twenty-five thousand dollars (\$25,000) per day, whichever amount is greater.

(2) In any action brought pursuant to paragraph (1), the court may award reasonable attorney's fees to a prevailing party.

(3) (A) In any action brought pursuant to paragraph (1), the electronic **mail** service provider shall be required to establish as an element of its cause of action that prior to the alleged violation, the defendant had actual notice of both of the following:

(i) The electronic **mail** service provider's policy on unsolicited electronic **mail** advertising.

(ii) The fact that the defendant's unsolicited electronic **mail** advertisements would use or cause to be used the electronic **mail** service provider's equipment located in this state.

(B) In this regard, the Legislature finds that with rapid advances in Internet technology, and electronic **mail** technology in particular, Internet service providers are already experimenting with embedding policy statements directly into the software running on the computers used to provide electronic **mail** services in a manner that displays the policy statements every time an electronic **mail** delivery is requested. While the state of the technology does not support such a finding at present, the Legislature believes that, in a given case at some future date, a showing that notice was supplied via electronic means between the sending and receiving computers could be held to constitute actual notice to the sender for purposes of this paragraph.

(4) (A) An electronic **mail** service provider who has brought an action against a party for a violation subject to Section 17529.8 shall not bring an action against that party under this section for the same unsolicited **commercial** electronic **mail** advertisement.

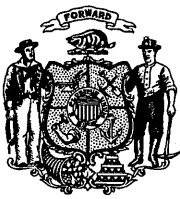
(B) An electronic **mail** service provider who has brought an action against a party for a violation of this section shall not bring an action against that party under Section 17529.8 for the same unsolicited **commercial** electronic **mail** advertisement.

SEC. 4. A cause of action that is in existence before the



effective date of this act shall not be affected by this act, but shall instead be governed by the law that was in effect at the time the cause of action arose.

SEC. 5. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.



11/03/03 FRI.  
State of Wisconsin  
2003 - 2004 LEGISLATURE

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PI  
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RNK:16

D-Note

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

Gen

1 AN ACT ...; relating to: the regulation of unsolicited ~~commercial~~ electronic mail  
2 advertisements.

*Analysis by the Legislative Reference Bureau*

This is a preliminary draft. An analysis will be provided in a later version of this draft.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

3 SECTION 1. 100.53 of the statutes is created to read:

4 **100.53 Regulation of unsolicited electronic mail.** (1) DEFINITIONS. In this  
5 section:

6 (a) "Advertiser" means a person that advertises through the use of electronic  
7 mail advertisements.

8 (b) "Domain name" means any alphanumeric designation that is registered  
9 with or assigned by any domain name registrar as part of an electronic address on  
10 the internet.

1 (c) "Electronic mail" means an electronic message that is sent to an electronic  
2 mail address and that is transmitted between 2 or more telecommunications devices,  
3 computers, or electronic devices capable of receiving electronic messages, whether  
4 or not the message is converted to hard copy format after receipt or is viewed upon  
5 transmission or stored for later retrieval. "Electronic mail" includes electronic  
6 messages that are transmitted through a local, regional, or global computer network.

\*\*\*\*NOTE: I question whether a definition of "electronic mail" is necessary. I think  
that the term is widely understood without a definition. Also, as technology advances,  
the definition may become too narrow or inaccurate. Even if a definition is desired, this  
definition is cumbersome and could probably be made more succinct.

7 (d) "Electronic mail address" means a destination, commonly expressed as a  
8 string of characters and consisting of a user name or mailbox and a reference to an  
9 internet domain, to which electronic mail can be sent or delivered. X

10 (e) "Electronic mail advertisement" means an electronic mail message initiated  
11 for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other  
12 disposition of property, goods, or services, or for advertising or promoting the  
13 extension of credit.

14 (f) "Electronic mail service provider" means any person, including an internet X  
15 service provider, that is an intermediary in sending or receiving electronic mail or  
16 that provides to end users of the electronic mail service the ability to send or receive  
17 electronic mail.

18 (g) "Incident" means a single transmission or delivery to a single recipient or  
19 to multiple recipients of an unsolicited electronic mail advertisement containing  
20 substantially similar content.

\*\*\*\*NOTE: I think that this definition is confusing. I think that the intent of this  
definition is to provide that when a person hits the send button, each "hit" of the button  
is an "incident" whether the electronic mail advertisement goes to one recipient or to  
many recipients with each "hit". If you agree that this is the intent of this provision, I  
recommend redrafting this definition to make this clear or possibly removing it from the X

definition provision entirely so that this concept is contained in a different part of the draft.

1 (h) "Preexisting or current business relationship" means that the recipient has  
2 made an inquiry and has provided his or her electronic mail address, has made an  
3 application or purchase, or has engaged in a transaction, regarding any property,  
4 goods, services, or the extension of credit offered by the advertiser. X

\*\*\*\*NOTE: I have reworded this provision so that it is consistent with the definition of "electronic mail advertisement" contained in this draft.

5 (i) "Recipient" means the addressee of an unsolicited electronic mail  
6 advertisement.

7 (j) "Routine transmission" means the transmission, routing, relaying,  
8 handling, or storing of an electronic mail message through an automatic technical  
9 process. "Routine transmission" does not include the sending, or the knowing X  
10 participation in the sending, of unsolicited electronic mail advertisements.

11 (k) "Unsolicited electronic advertisement" means an electronic mail  
12 advertisement to which all of the following applies:

13 1. ~~It~~ It is sent by an advertiser to a recipient who has not provided express  
14 consent to receive advertisements from the advertiser either in response to a clear  
15 and conspicuous request for consent or at the recipient's own initiative.

16 2. ~~It~~ It is sent to a recipient who does not have a preexisting or current business  
17 relationship with the advertiser.

\*\*\*\*NOTE: This provision, as it appears in the California bill is confusing. I have redrafted the provision but am not certain that it captures the intent of the provision as contained in the California bill.

18 (L) "Wisconsin electronic mail address" means any of the following:

19 1. An electronic mail address furnished by an electronic mail service provider  
20 that sends bills for furnishing and maintaining that electronic mail address to a  
21 mailing address in this state.

1           2. An electronic mail address ordinarily accessed from a computer located in  
2 this state.

      \*\*\*NOTE: I'm not sure what "ordinarily accessed" means. Does it mean accessed  
from a computer located in this state more than 50 percent of the time?

3           3. An electronic mail address furnished to a resident of this state.

4           (2) TRANSMISSION OF CERTAIN ELECTRONIC MAIL PROHIBITED. (a) No person may  
5 do any of the following:

6           1. Transmit or cause to be transmitted an unsolicited electronic mail  
7 advertisement from this state or to a Wisconsin electronic mail address.

8           2. Assist in the transmission of an unsolicited electronic mail advertisement  
9 to a Wisconsin electronic mail address by providing electronic mail addresses where  
10 an advertisement may be sent.

2       ~~2~~ \*\*\*NOTE: Subdivision 2. above is very broad. It seems to suggest that if a person  
gives only ~~two~~ electronic mail addresses to an advertiser who then uses those addresses  
to send 2 electronic mail advertisements, the person <sup>Δ</sup>would be violating this provision.  
Is this consistent with your intent? X

11          (b) Paragraph (a) does not apply to any of the following:

12          1. A telecommunications utility or electronic mail service provider that engages  
13 in the routine transmission of an advertisement through its network or system.

      \*\*\*NOTE: Please note that this is the only occurrence in the draft of the defined  
term "routine transmission". See proposed sub. (1)(k) in this draft. When the definition  
of "routine transmission" is inserted into this provision, the effect of this provision is  
confusing. I think the intent of this provision is to make clear that an electronic mail  
provider is not in violation of proposed sub. (2) if the provider is simply sending electronic  
mail as an intermediary and without knowledge of the content of that electronic mail.  
If this is the intent of this provision, I think it can be said more clearly and simply. Do  
you agree? X

14          2. A person who sends an unsolicited electronic mail advertisement to a  
15 recipient with whom the person has a preexisting or current business relationship  
16 unless the recipient has notified the sender that the recipient does not want to  
17 receive any further unsolicited electronic mail advertisements from the sender.

1 (3) COLLECTION OF ELECTRONIC MAIL ADDRESSES. No person may do any of the  
2 following:

3 (a) Collect electronic mail addresses posted on the internet if the person collects  
4 the electronic mail addresses for the purpose of transmitting, causing to be  
5 transmitted, or assisting in the transmission of an unsolicited electronic mail  
6 advertisement from this state or to a Wisconsin electronic mail address.

7 (b) Use an electronic mail address obtained by using automated means ~~based~~  
8 ~~on a combination of names, letters, or numbers~~ <sup>any</sup> to do ~~any~~ of the following:

9 1. Transmit or cause to be transmitted an unsolicited electronic mail  
10 advertisement from this state or to a Wisconsin electronic mail address.

11 2. Assist in the transmission of an unsolicited electronic mail advertisement  
12 to a Wisconsin electronic mail address by providing electronic mail addresses where  
13 an advertisement may be sent.

14 (c) Use scripts or other automated means to register for multiple electronic mail  
15 accounts from which to do, or to enable another person to do, ~~any~~ <sup>any</sup> of the following:

16 1. Transmit or cause to be transmitted an unsolicited electronic mail  
17 advertisement from this state or to a Wisconsin electronic mail address.

18 2. Assist in the transmission of an unsolicited electronic mail advertisement  
19 to a Wisconsin electronic mail address by providing electronic mail addresses where  
20 an advertisement may be sent.

*, which comes from the California law,*  
\*\*\*\*NOTE: This provision is very confusing. It is not entirely clear what kinds of  
activity this provision is intended to address. For example, what does it mean to use an  
electronic mail address obtained by "using automated means"? Does this mean the same  
thing as using an electronic mail address obtained from addresses "posted on the  
internet"? Also, how does a person "assist in the transmission" of an unsolicited electronic  
mail advertisement? And is the term "scripts" a term that the average person would  
understand? ~~This provision will require redrafting in the next version of the draft.~~

X

(4) FALSE OR MISLEADING ADDRESSES. No person may send an electronic mail advertisement from this state or to a Wisconsin electronic mail address if any of the following applies:

(a) The electronic mail advertisement contains or is accompanied by a <sup>3rd</sup> ~~third~~ party's domain name without the permission of the <sup>3rd</sup> ~~third~~ party.

(b) The electronic mail advertisement contains header information that is false or forged or that contains obscured information or misrepresentations. This <sup>3rd</sup> ~~third~~ paragraph <sup>✓</sup> does not apply to truthful information used by a <sup>3rd</sup> ~~third~~ party who has been lawfully authorized by the advertiser to use that information.

\*\*\*NOTE: I do not understand the last sentence in this provision.

(c) The electronic mail advertisement has a subject line that a person acting reasonably under the circumstances would know would be likely to mislead a recipient about a material fact regarding the contents or subject matter of the message.

(5) PREEXISTING OR CURRENT RELATIONSHIPS. (a) Any person who sends an unsolicited electronic mail advertisement to a recipient with whom the person has a preexisting or current business relationship shall include in the unsolicited electronic mail advertisement a toll-free telephone number or a return electronic mail address that the recipient may use to notify the sender that the recipient does not want to receive any unsolicited electronic mail advertisements from the sender.

(b) Paragraph (a) does not apply to a person who provides free electronic mail service to electronic mail recipients. (CS)

(6) ~~any person who~~ Civil actions. (a) Any of the following may bring an action to recover damages against any person who violates this section:

1 1. A recipient of an unsolicited electronic mail advertisement transmitted in  
2 violation of this section.

3 2. An electronic mail service provider.

\*\*\*\*NOTE: Can any provider bring an action or must the provider be one who has unwittingly been used to send unsolicited electronic mail?

4 3. The department of justice.

*after consulting with the  
Department of agriculture, trade and  
consumer protection*

5 (b) A person who brings an action under par. (a) may recover either or both of  
6 the following:

7 1. Actual damages.

8 2. Liquidated damages of \$1,000 for each unsolicited electronic mail  
9 advertisement transmitted in violation of this section, but not more than \$1,000,000  
10 for each incident.

11 (c) Notwithstanding par. (b) 2., if a court finds that the defendant established  
12 and implemented, with due care, practices and procedures reasonably designed to  
13 effectively prevent the transmission of unsolicited electronic mail advertisements  
14 that are in violation of this section, the court shall reduce the amount of liquidated  
15 damages recoverable under par. (b) 2. to not more than \$100 for each unsolicited  
16 electronic mail advertisement transmitted, or not more than \$100,000 per incident.

\*\*\*\*NOTE: Should this be "whichever is more" or "whichever is less"?

17 (d) An electronic mail service provider who has brought an action against a  
18 person for a violation of s. 100.54 may not bring an action against that person for a  
19 violation of this section for the same unsolicited electronic mail advertisement.

20 (e) In any action brought under this section, the court may award the prevailing  
21 plaintiff reasonable attorney's fees and costs, notwithstanding s. 814.04 (1).

22 **SECTION 2.** 100.54 of the statutes is created to read:



1           **100.54 Electronic mail service providers.** (1) DEFINITIONS. (a) “Electronic  
2 mail advertisement” means any electronic mail message, the principal purpose of  
3 which is to promote, directly or indirectly, the sale or other distribution of goods or  
4 services to the recipient.

5           (b) “Unsolicited electronic mail advertisement” means any electronic mail  
6 advertisement that meets both of the following requirements:

7           1. It is addressed to a recipient with whom the initiator does not have an  
8 existing business or personal relationship.

9           2. It is not sent at the request of or with the express consent of the recipient.

10          (c) “Electronic mail service provider” means any business or organization  
11 qualified to do business in this state that provides registered users the ability to send  
12 or receive electronic mail through equipment located in this state and that is an  
13 intermediary in sending or receiving electronic mail.

14          (d) “Initiation” of an unsolicited electronic mail advertisement means the  
15 action of the initial sender of the electronic mail advertisement. It does not include  
16 the action of any intervening electronic mail service provider that may handle or  
17 retransmit the electronic message.

18          (e) “Registered user” means any person that maintains an electronic mail  
19 address with an electronic mail service provider.

20          (2) <sup>Prohibition. - CS</sup> If an electronic mail service provider has a policy prohibiting or restricting  
21 the use of its service or equipment for the initiation of unsolicited electronic mail  
22 advertisements, then no registered user of that electronic mail service provider may  
23 use or cause to be used any of that electronic mail service provider’s equipment  
24 located in this state in violation of policy.

(CS)

Construction.

1 (3) Nothing in this section shall be construed to limit or restrict any of the  
2 following:

3 (a) The rights of an electronic mail service provider under 47 USC 230 (c) (1).

4 (b) Any decision by an electronic mail service provider to permit or to restrict  
5 access to or use of its system .

6 (c) Any decision by an electronic mail service provider to permit or to restrict  
7 the exercise of its editorial function.

\*\*\*\*NOTE: I have redrafted this provision to try and make it more clear but I am not  
sure I have captured the intent of this provision. I think that this provision will require  
additional redrafting after further discussion of its probable intent.

(CS) Civil actions.

8 (4) (a) An electronic mail service provider may bring a civil action against any  
9 person who violates the electronic mail service provider's policy in the manner  
10 specified under sub. (2).

11 (b) An electronic mail service provider who brings a civil action under par. (a)  
12 may recover an amount equal to the greater of either of the following:

13 1. An amount equal to the actual monetary loss suffered by that electronic mail  
14 service provider.

15 2. Liquidated damages in the amount of \$50 for each electronic mail message  
16 initiated or delivered in violation of sub. (2), but not more than \$25,000.

17 (c) The court may award reasonable attorney's fees to the prevailing party  
18 notwithstanding s. 814.04 (1).

19 (d) In any action brought under sub. (2), the electronic mail service provider  
20 shall establish as an element of its cause of action that prior to the alleged violation,  
21 the defendant had actual notice of both of the following:

22 1. The electronic mail service provider's policy on unsolicited electronic mail  
23 advertising.

2. The fact that the defendant's unsolicited electronic mail advertisements would use the electronic mail service provider's equipment located in this state.

~~14.001~~<sup>(e)</sup> An electronic mail service provider who has brought an action against a person for a violation of s. 100.53 may not bring an action against that person for a violation of this section for the same unsolicited electronic mail advertisement.

**(END)**

# O-Note

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-3349/P1dn

RNK: *[Signature]*

*Date*

*I have*  
*this draft on*  
In accordance with your instructions, ~~this draft is~~ based ~~on~~ California law. I have redrafted many provisions in this draft for purposes of clarity. However, certain provisions in the California law were difficult to understand, and in those cases I have placed notes throughout the draft for your consideration. One of the difficulties with this draft was based on the fact that so much of the substance of the California law is contained in definitions. This makes the law confusing because the reader must constantly go back to the definitions as the reader makes his or her way through the law. I have eliminated or made more concise certain of the definitions in the California law to make the draft more readable. But I think additional improvements can be made. For all of these reasons, I have put this draft in preliminary form. Please review the draft closely to ensure that it is consistent with your intent.

*after consultation with DATCP*  
I have placed the provisions of this draft in ch. 100, stats. This chapter is administered by DATCP, although the draft gives the department of justice authority to bring civil actions ~~(under the draft)~~. Is this consistent with your intent? *X*

*The*  
This draft could be subject to a constitutional challenge on the basis that it violates the Commerce Clause of the U. S. Constitution. ~~Not to know the~~ Commerce Clause limits the authority of the states to enact legislation affecting interstate commerce.

Generally, the U.S. Supreme Court has identified two areas of inquiry in examining whether a statute violates the Commerce Clause. The court first asks if the statute discriminates against interstate commerce. *X* If the court concludes that the statute does not discriminate against interstate commerce, the court then asks whether the statute imposes a burden on interstate commerce that is clearly excessive in relation to the local state interest. In other words, under the second inquiry, the court applies a balancing test.

*in*  
There are two recent cases that have examined the question of whether a state law regulating unsolicited e-mail (spam) violates the Commerce Clause. In *State of Washington v. Heckel*, 24 P. 3d 404 (2001), and *Ferguson v. Friendfinders*, 94 Cal. App 4th 1255 (2002), the Washington Supreme Court and the California appeals court concluded, respectively, that the Washington and California statutes regulating the sending of spam do not violate the Commerce Clause. The law examined by the California court in the *Ferguson* case was the law in effect ~~in~~ California before

enactment of the law on which this draft is based. While it is impossible to predict how a Wisconsin court would rule if this proposal was challenged on Commerce Clause grounds, these cases would seem to suggest that state courts may be leaning in favor of a determination that carefully drawn state laws regulating spam are likely to survive a Commerce Clause challenge.

Please feel free to contact me if you have any questions concerning this draft.

Robin N. Kite  
Legislative Attorney  
Phone: (608) 266-7291  
E-mail: robin.kite@legis.state.wi.us

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-3349/P1dn  
RNK:kjf:ch

October 29, 2003

In accordance with your instructions, I have based this draft on California law. I have redrafted many provisions in this draft for purposes of clarity. However, certain provisions in the California law were difficult to understand, and in those cases I have placed notes throughout the draft for your consideration. One of the difficulties with this draft was based on the fact that so much of the substance of the California law is contained in definitions. This makes the law confusing because the reader must constantly go back to the definitions as the reader makes his or her way through the law. I have eliminated or made more concise certain of the definitions in the California law to make the draft more readable. But I think additional improvements can be made. For all of these reasons, I have put this draft in preliminary form. Please review the draft closely to ensure that it is consistent with your intent.

I have placed the provisions of this draft in ch. 100, stats. This chapter is administered by DATCP, although the draft gives the Department of Justice authority to bring civil actions after consultation with DATCP. Is this consistent with your intent?

This draft could be subject to a constitutional challenge on the basis that it violates the Commerce Clause of the U. S. Constitution. The Commerce Clause limits the authority of the states to enact legislation affecting interstate commerce.

Generally, the U.S. Supreme Court has identified two areas of inquiry in examining whether a statute violates the Commerce Clause. The court first asks if the statute discriminates against interstate commerce. If the court concludes that the statute does not discriminate against interstate commerce, the court then asks whether the statute imposes a burden on interstate commerce that is clearly excessive in relation to the local state interest. In other words, under the second inquiry, the court applies a balancing test.

There are two recent cases that have examined the question of whether a state law regulating unsolicited e-mail (spam) violates the Commerce Clause. In *State of Washington v. Heckel*, 24 P. 3d 404 (2001), and *Ferguson v. Friendfinders*, 94 Cal. App 4th 1255 (2002), the Washington Supreme Court and the California appeals court concluded, respectively, that the Washington and California statutes regulating the sending of spam do not violate the Commerce Clause. The law examined by the California court in the *Ferguson* case was the law in effect in California before enactment of the law on which this draft is based. While it is impossible to predict how

a Wisconsin court would rule if this proposal was challenged on Commerce Clause grounds, these cases would seem to suggest that state courts may be leaning in favor of a determination that carefully drawn state laws regulating spam are likely to survive a Commerce Clause challenge.

Please feel free to contact me if you have any questions concerning this draft.

Robin N. Kite  
Legislative Attorney  
Phone: (608) 266-7291  
E-mail: robin.kite@legis.state.wi.us

**Kite, Robin**

---

**From:** Graf, Bill  
**Sent:** Wednesday, November 05, 2003 1:48 PM  
**To:** Kite, Robin  
**Subject:** LRB 3349 (unsolicited e-mail)

Robin,

Spence has reviewed LRB-3349/P1. He agrees with you that the provision on page 4, lines 11-13, should be restated more clearly and simply as you suggested, so please redraft that part. That is the only change he would like you to make. The rest of the draft is fine as is.

**Bill Graf**

Assistant to Representative Spencer Black

214 North, State Capitol  
P.O. Box 8952  
Madison, WI 53708  
(608) 266-7521





Fri. (10/14)  
State of Wisconsin  
2003 - 2004 LEGISLATURE

LRB-3349/~~13~~  
RNK:kjf/~~16~~

D-Note

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

prohibiting the transmission of certain electronic mail messages, prohibiting the collection of certain electronic mail addresses, prohibiting the registration for electronic mail accounts for certain ~~uses~~ ~~purposes~~ purposes, and prohibiting the violation of policies of electronic mail service providers

Regen

1 AN ACT to create 100.53 and 100.54 of the statutes; relating to: the regulation  
2 of unsolicited electronic mail advertisements.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version of this draft.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 100.53 of the statutes is created to read:

100.53 Regulation of unsolicited electronic mail. (1) DEFINITIONS. In this section:

(a) "Advertiser" means a person that advertises through the use of electronic mail advertisements.

(b) "Domain name" means any alphanumeric designation that is registered with or assigned by any domain name registrar as part of an electronic address on the Internet.

1 (c) "Electronic mail" means an electronic message that is sent to an electronic  
2 mail address and that is transmitted between 2 or more telecommunications devices,  
3 computers, or electronic devices capable of receiving electronic messages, whether  
4 or not the message is converted to hard copy format after receipt or is viewed upon  
5 transmission or stored for later retrieval. "Electronic mail" includes electronic  
6 messages that are transmitted through a local, regional, or global computer network.

\*\*\*\*NOTE: I question whether a definition of "electronic mail" is necessary. I think  
that the term is widely understood without a definition. Also, as technology advances,  
the definition may become too narrow or inaccurate. Even if a definition is desired, this  
definition is cumbersome and could probably be made more succinct.

7 (d) "Electronic mail address" means a destination, commonly expressed as a  
8 string of characters and consisting of a user name or mailbox and a reference to an  
9 Internet domain, to which electronic mail can be sent or delivered.

10 (e) "Electronic mail advertisement" means an electronic mail message initiated  
11 for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other  
12 disposition of property, goods, or services, or for advertising or promoting the  
13 extension of credit.

14 (f) "Electronic mail service provider" means any person, including an Internet  
15 service provider, that is an intermediary in sending or receiving electronic mail or  
16 that provides to end users of the electronic mail service the ability to send or receive  
17 electronic mail.

18 (g) "Incident" means a single transmission or delivery to a single recipient or  
19 to multiple recipients of an unsolicited electronic mail advertisement containing  
20 substantially similar content.

\*\*\*\*NOTE: I think that this definition is confusing. I think that the intent of this  
definition is to provide that when a person hits the send button, each "hit" of the button  
is an "incident" whether the electronic mail advertisement goes to one recipient or to  
many recipients with each "hit." If you agree that this is the intent of this provision, I  
recommend redrafting this definition to make this clear or possibly removing it from the

~~definition provision entirely so that this concept is contained in a different part of the draft.~~

(h) "Preexisting or current business relationship" means that the recipient has made an inquiry and has provided his or her electronic mail address, has made an application or purchase, or has engaged in a transaction, regarding any property, goods, services, or the extension of credit offered by the advertiser.

~~\*\*\*\*NOTE: I have reworded this provision so that it is consistent with the definition of "electronic mail advertisement" contained in this draft.~~

(i) "Recipient" means the addressee of an unsolicited electronic mail advertisement.

~~(j) "Routine transmission" means the transmission, routing, relaying, handling, or storing of an electronic mail message through an automatic technical process. "Routine transmission" does not include the sending, or the knowing participation in the sending, of unsolicited electronic mail advertisements.~~

~~(k) "Unsolicited electronic advertisement" means an electronic mail advertisement to which all of the following applies:~~

~~that~~  
~~It is sent by an advertiser to a recipient who has not provided express consent to receive advertisements from the advertiser either in response to a clear and conspicuous request for consent or at the recipient's own initiative.~~

~~2. It is sent to a recipient who does not have a preexisting or current business relationship with the advertiser.~~

~~\*\*\*\*NOTE: This provision as it appears in the California bill is confusing. I have redrafted the provision but am not certain that it captures the intent of the provision as contained in the California bill.~~

~~(k)~~  
~~(j) "Wisconsin electronic mail address" means any of the following:~~

1. An electronic mail address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that electronic mail address to a mailing address in this state.

1           2. An electronic mail address ordinarily accessed from a computer located in  
2 this state.

\*\*\*\*NOTE: I'm not sure what "ordinarily accessed" means. Does it mean accessed  
from a computer located in this state more than 50 percent of the time?

3           3. An electronic mail address furnished to a resident of this state.

4           (2) TRANSMISSION OF CERTAIN ELECTRONIC MAIL <sup>advertisements</sup> PROHIBITED. (a) No person may  
5 do any of the following:

6           1. Transmit or cause to be transmitted an unsolicited electronic mail  
7 advertisement from this state or to a Wisconsin electronic mail address.

8           2. Assist in the transmission of an unsolicited electronic mail advertisement  
9 to a Wisconsin electronic mail address by providing electronic mail addresses where  
10 an advertisement may be sent.

\*\*\*\*NOTE: Subdivision 2. above is very broad. It seems to suggest that if a person  
gives only 2 electronic mail addresses to an advertiser who then uses those addresses to  
send 2 electronic mail advertisements, the person would be violating this provision. Is  
this consistent with your intent?

11           (b) Paragraph (a) does not apply to any of the following:

12           1. A telecommunications utility or electronic mail service provider that engages  
13 in the routine transmission of an advertisement through its network or system.

\*\*\*\*NOTE: Please note that this is the only occurrence in the draft of the defined  
term "routine transmission." See proposed sub. (1)(k) in this draft. When the definition  
of "routine transmission" is inserted into this provision, the effect of this provision is  
confusing. I think the intent of this provision is to make clear that an electronic mail  
provider is not in violation of proposed sub. (2) if the provider is simply sending electronic  
mail as an intermediary and without knowledge of the content of that electronic mail.  
If this is the intent of this provision, I think it can be said more clearly and simply. Do  
you agree?

insert  
4-13  
14           2. A person who ~~sends~~ <sup>transmits</sup> an unsolicited electronic mail advertisement to a  
15 recipient with whom the person has a preexisting or current business relationship  
16 unless the recipient has notified the sender that the recipient does not want to  
17 receive any further unsolicited electronic mail advertisements from the sender.

<sup>transmits</sup>  
<sup>causes to be transmitted,</sup>  
~~transmits~~ for assistance in the transmission of,

(CS)

1           (3) COLLECTION OF ELECTRONIC MAIL ADDRESSES/ ; account registration  
2 following:

3           (a) Collect electronic mail addresses posted on the Internet if the person collects  
4 the electronic mail addresses for the purpose of transmitting, causing to be  
5 transmitted, or assisting in the transmission of an unsolicited electronic mail  
6 advertisement from this state or to a Wisconsin electronic mail address.

7           (b) Use an electronic mail address obtained by using automated means to do  
8 any of the following:

9           1. Transmit or cause to be transmitted an unsolicited electronic mail  
10 advertisement from this state or to a Wisconsin electronic mail address.

11           2. Assist in the transmission of an unsolicited electronic mail advertisement  
12 to a Wisconsin electronic mail address by providing electronic mail addresses where  
13 an advertisement may be sent.

14           (c) Use scripts or other automated means to register for multiple electronic mail  
15 accounts from which to do, or to enable another person to do, any of the following:

16           1. Transmit or cause to be transmitted an unsolicited electronic mail  
17 advertisement from this state or to a Wisconsin electronic mail address.

18           2. Assist in the transmission of an unsolicited electronic mail advertisement  
19 to a Wisconsin electronic mail address by providing electronic mail addresses where  
20 an advertisement may be sent.

\*\*\*\*NOTE: This provision, which comes from the California law, is very confusing. It is not entirely clear what kinds of activity this provision is intended to address. For example, what does it mean to use an electronic mail address obtained by "using automated means"? Does this mean the same thing as using an electronic mail address obtained from addresses "posted on the Internet"? Also, how does a person "assist in the transmission" of an unsolicited electronic mail advertisement? And is the term "scripts" a term that the average person would understand?

1           (4) FALSE OR MISLEADING ADDRESSES. No person may send an electronic mail  
2 advertisement from this state or to a Wisconsin electronic mail address if any of the  
3 following applies:

4           (a) The electronic mail advertisement contains or is accompanied by a 3rd  
5 party's domain name without the permission of the 3rd party.

6           (b) The electronic mail advertisement contains header information that is false  
7 or forged or that contains obscured information or misrepresentations. This  
8 paragraph does not apply to truthful information used by a 3rd party who has been  
9 lawfully authorized by the advertiser to use that information.

~~\*\*\*\*NOTE: I do not understand the last sentence in this provision.~~

10           (c) The electronic mail advertisement has a subject line that a person acting  
11 reasonably under the circumstances would know would be likely to mislead a  
12 recipient about a material fact regarding the contents or subject matter of the  
13 message.

14           (5) PREEXISTING OR CURRENT RELATIONSHIPS. (a) Any person who sends an  
15 unsolicited electronic mail advertisement to a recipient with whom the person has  
16 a preexisting or current business relationship shall include in the unsolicited  
17 electronic mail advertisement a toll-free telephone number or a return electronic  
18 mail address that the recipient may use to notify the sender that the recipient does  
19 not want to receive any unsolicited electronic mail advertisements from the sender.

20           (b) Paragraph (a) does not apply to a person who provides free electronic mail  
21 service to electronic mail recipients.

22           (6) CIVIL ACTIONS. (a) Any of the following may bring an action to recover  
23 damages against any person who violates this section:

1           1. A recipient of an unsolicited electronic mail advertisement transmitted in  
2 violation of this section.

3           2. An electronic mail service provider.

\*\*\*\*NOTE: Can any provider bring an action or must the provider be one who has  
unwittingly been used to send unsolicited electronic mail?

4           3. The department of justice, after consulting with the department of  
5 agriculture, trade and consumer protection.

6           (b) A person who brings an action under par. (a) may recover either or both of  
7 the following:

8           1. Actual damages.

9           2. Liquidated damages of \$1,000 for each unsolicited electronic mail  
10 advertisement transmitted in violation of this section, but not more than \$1,000,000  
11 for each incident.

12           (c) Notwithstanding par. (b) 2., if a court finds that the defendant established  
13 and implemented, with due care, practices and procedures reasonably designed to  
14 effectively prevent the transmission of unsolicited electronic mail advertisements  
15 that are in violation of this section, the court shall reduce the amount of liquidated  
16 damages recoverable under par. (b) 2. to not more than \$100 for each unsolicited  
17 electronic mail advertisement transmitted, or not more than \$100,000 per incident.

\*\*\*\*NOTE: Should this be "whichever is more" or "whichever is less"?

18           (d) An electronic mail service provider who has brought an action against a  
19 person for a violation of s. 100.54 may not bring an action against that person for a  
20 violation of this section for the same unsolicited electronic mail advertisement.

21           (e) In any action brought under this section, the court may award the prevailing  
22 plaintiff reasonable attorney's fees and costs, notwithstanding s. 814.04 (1).

23           **SECTION 2.** 100.54 of the statutes is created to read:

Policies of (b)

1 **100.54** ~~Electronic~~ <sup>(b)</sup> **mail service providers.** (1) DEFINITIONS. (a) “Electronic  
2 mail advertisement” means any electronic mail message, the principal purpose of  
3 which is to promote, directly or indirectly, the sale or other distribution of goods or  
4 services to the recipient.

5 ~~(e)~~ <sup>(e)</sup> “Unsolicited electronic mail advertisement” means any electronic mail  
6 advertisement that meets both of the following requirements:

7 1. It is addressed to a recipient with whom the initiator does not have an  
8 existing business or personal relationship.

9 2. It is not sent at the request of or with the express consent of the recipient.

10 ~~(b)~~ <sup>(b)</sup> “Electronic mail service provider” means any business or organization  
11 qualified to do business in this state that provides registered users the ability to send  
12 or receive electronic mail through equipment located in this state and that is an  
13 intermediary in sending or receiving electronic mail.

14 ~~(c)~~ <sup>(c)</sup> “Initiation” of an unsolicited electronic mail advertisement means the  
15 action of the initial sender of the electronic mail advertisement. It does not include  
16 the action of any intervening electronic mail service provider that may handle or  
17 retransmit the electronic message.

18 ~~(d)~~ <sup>(d)</sup> “Registered user” means any person that maintains an electronic mail  
19 address with an electronic mail service provider.

20 (2) PROHIBITION. If an electronic mail service provider has a policy prohibiting  
21 or restricting the use of its service or equipment for the initiation of unsolicited  
22 electronic mail advertisements, then no registered user of that electronic mail  
23 service provider may use or cause to be used any of that electronic mail service  
24 provider’s equipment located in this state in violation of <sup>that</sup> policy.



1           (3) CONSTRUCTION. Nothing in this section shall be construed to limit or restrict  
2 any of the following:

3           (a) The rights of an electronic mail service provider under 47 USC 230 (c) (1).

4           (b) Any decision by an electronic mail service provider to permit or to restrict  
5 access to or use of its system.

6           (c) Any decision by an electronic mail service provider to permit or to restrict  
7 the exercise of its editorial function.

\*\*\*\*NOTE: I have redrafted this provision to try and make it more clear but I am not  
sure I have captured the intent of this provision. I think that this provision will require  
additional redrafting after further discussion of its probable intent.

8           (4) CIVIL ACTIONS. (a) An electronic mail service provider may bring a civil  
9 action against any ~~person~~ <sup>registered user</sup> who violates the electronic mail service provider's policy  
10 in the manner specified under sub. (2).

11           (b) An electronic mail service provider who brings a civil action under par. (a)  
12 may recover an amount equal to the greater of either of the following:

13           1. An amount equal to the actual monetary loss suffered by that electronic mail  
14 service provider.

15           2. Liquidated damages in the amount of \$50 for each electronic mail message  
16 initiated or delivered in violation of sub. (2), but not more than \$25,000.

17           (c) The court may award reasonable attorney's fees to the prevailing party  
18 notwithstanding s. 814.04 (1).

19           (d) In any action brought under sub. (2), the electronic mail service provider  
20 shall establish as an element of its cause of action that prior to the alleged violation,  
21 the defendant had actual notice of both of the following:

22           1. The electronic mail service provider's policy on unsolicited electronic mail  
23 advertising.

2. The fact that the defendant's unsolicited electronic mail advertisements would use the electronic mail service provider's equipment located in this state.

(e) An electronic mail service provider who has brought an action against a person for a violation of s. 100.53 may not bring an action against that person for a violation of this section for the same unsolicited electronic mail advertisement.

**(END)**

# O-Note

2003-2004 DRAFTING INSERT  
FROM THE  
LEGISLATIVE REFERENCE BUREAU

LRB-3349/1ins.  
RNK:.....

INSERT ANALYSIS

This bill regulates the conduct of persons who transmit certain electronic mail advertisements. This bill prohibits persons from transmitting unsolicited electronic mail advertisements either from this state or to an electronic mail address in this state. The bill defines an unsolicited electronic mail advertisement as an electronic mail advertisement that is sent by an advertiser to a recipient who has not provided express consent to receive advertisements from the advertiser and that is initiated to advertise the lease or sale of property, goods, or services or to promote the extension of credit. The prohibition does not apply to a telecommunications utility or electronic mail service provider that transmits an electronic mail advertisement only as an intermediary. It also does not apply to a person who transmits an unsolicited electronic mail advertisement to a recipient with whom the person has a preexisting or current business relationship unless the recipient has notified the sender that the recipient does not want to receive any further unsolicited electronic mail advertisements from the sender.

This bill also prohibits certain conduct that relates to the method by which a person collects or uses electronic mail addresses. The bill prohibits persons from collecting electronic mail addresses posted on the Internet if the person collects those addresses for the purpose of transmitting, causing to be transmitted, or assisting in the transmission of (transmitting), unsolicited electronic mail advertisements. It also prohibits a person from using an electronic mail address obtained by using automated means to transmit unsolicited electronic mail advertisements. Additionally, the bill prohibits a person from using scripts or other automated means to register for multiple electronic mail accounts from which to transmit unsolicited electronic mail advertisements.

This bill also prohibits a person from sending an electronic mail advertisement that contains or is accompanied by a 3rd party's domain name without that 3rd party's permission and prohibits the use of certain false or forged header information or misleading subject line information.

Under this bill, a person who sends unsolicited electronic mail advertisements to a recipient with whom the person has a preexisting or current business relationship must include in the electronic mail advertisement a toll-free telephone number or return electronic mail address that the recipient may use to notify the sender that the recipient does not want to receive unsolicited electronic mail advertisements from the sender. The department of justice,

The bill authorizes electronic mail service providers, and recipients of unsolicited electronic mail advertisements transmitted in violation of the provisions discussed above to bring an action against the violator to recover damages.

This bill also regulates the conduct of certain registered users of electronic mail service providers. Under the bill, if an electronic mail service provider has a policy that prohibits or restricts the use of its service or equipment for the initiation of certain kinds of electronic mail advertisements, then that service provider's registered users may not use the provider's equipment located in this state in violation of that policy. If a registered user violates the provider's policies, the

electronic mail service provider may bring a civil action against that registered user to recover damages.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

INSERT 4-13

1. A telecommunications utility or electronic mail service provider that transmits, causes to be transmitted, or assists in the transmission of an electronic mail advertisement only as an intermediary.

**DRAFTER'S NOTE  
FROM THE  
LEGISLATIVE REFERENCE BUREAU**

LRB-3349/1dn

RNK: 

*Date*

I have prepared this redraft in introducible form in accordance with your instructions. Please note that I have made some additional minor changes to the draft to remedy certain inconsistencies and for the purposes of clarity.

Please feel free to contact me if you have any questions concerning this draft.

Robin N. Kite  
Legislative Attorney  
Phone: (608) 266-7291  
E-mail: robin.kite@legis.state.wi.us

**DRAFTER'S NOTE**  
**FROM THE**  
**LEGISLATIVE REFERENCE BUREAU**

LRB-3349/1dn  
RNK:kjf:jf

November 13, 2003

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**Emery, Lynn**

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**From:** Graf, Bill  
**Sent:** Thursday, November 13, 2003 2:45 PM  
**To:** LRB.Legal  
**Subject:** jacketing request

Please jacket LRB-3349/1 for introduction as an Assembly bill. Thank you.

**Bill Graf**  
Assistant to Representative Spencer Black

214 North, State Capitol  
P.O. Box 8952  
Madison, WI 53708  
(608) 266-7521